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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

THOMAS BERTRAM DIXSON,

Petitioner,

vs.

ANDREA A. RUFF, Trustee,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Middle District of Florida

PETITION FOR A WRIT OF CERTIORARI

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66 pp

QUESTIONS PRESENTED

Does the existence of common statutory sections, together with a vague commonality of "underlying theme" and a debtor's alleged misconduct suffice to permit the filing of an amended complaint some 14 months after expiration of the limitations period in Rule 4004, Federal Rules of Bankruptcy Procedure, where there is no factual nexus between the original complaint objecting to discharge and the new claims asserted by the proposed amended complaint so as to permit relation back to the original complaint under Federal Rule of Civil Procedure 15(c)(2).

Does perceived debtor misconduct and the policy of according a discharge only to "honest debtors" justify what amounts to an equitable tolling of the limitations period in Rule 4004, Federal Rules of Bankruptcy Procedure in contradiction to precedent of this Court.

PARTIES TO THE PROCEEDING

The only parties to this proceeding are the parties below before the Court of Appeals, *viz.*,

Andrea A. Ruff, Trustee and Thomas Bertram Dixson, debtor.

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Petitioner, Thomas Bertram Dixson, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion dated May 14, 1997 of the United States Court of Appeals for the Eleventh Circuit is unpublished and appears in Appendix A. The decision of the Eleventh Circuit amending its opinion of May 14, 1997, appears in Appendix B. The opinion of the District Court in *Ruff v. Dixson*, 93-609-CIV-ORL-18 and 93-610-CIV-ORL-18 (M.D. Fla., March 15, 1996) is likewise not published and appears in Appendix C. The opinion of the United States Bankruptcy Court, *Ruff v. Dixson*, appears at 153 B.R. 594 (Bky. M.D. Fla. 1996) (App. D).

STATEMENT OF JURISDICTION

The Court of Appeals denied a timely petition for rehearing on June 26, 1997 (App. E). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

11 U.S.C. § 727(c)(1) provides:

> (1) The trustee, a creditor, or the United States trustee may object to the granting of a discharge under subsection (a) of this section.

Rule 4004, Federal Rules of Bankruptcy Procedure, provides in pertinent part:

> (a) In a chapter 7 liquidation case a

> complaint objecting to the debtor's discharge under section 727 of the Code shall be filed not later than 60 days following the first date set for the meeting of creditors pursuant to section 341(a) . . .
>
> (b) On motion of any party in interest, after hearing on notice, the court may extend for cause the time for filing a complaint objecting to discharge. The motion shall be made before such time has expired.
>
> (c)(1) In a chapter 7 case, on expiration of the time fixed for filing a complaint objecting to discharge and the time fixed for filing a motion to dismiss the case pursuant to Rule 1017(e), the court shall forthwith grant a discharge unless: . . .
>
> > (b) a complaint objecting to the discharge has been filed, . . .
> >
> > (e) a motion to extend the time for filing objecting to discharge is pending . . .

Rule 7015, Federal Rules of Bankruptcy Procedure (Rule 15, Federal Rules of Civil Procedure, provides in pertinent part:

> (a) A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served . . . Otherwise a party may amend a party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires . . .

> (c) An amendment of a pleading relates back to the date of the original pleading when
>
> > (1) relation back is permitted by the law that provides the statute of limitations to the action, or
> >
> > (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading . . .

STATEMENT OF THE CASE

The fundamental questions presented by this case are: (1) whether a bankruptcy trustee, some 14 months after the expiration of the limitations period set forth in Rule 4004, Federal Rules of Bankruptcy Procedure, and 7 days prior to the actual trial, may amend her complaint to allege claims having a completely different factual basis from those alleged in her original complaint and which, therefore, cannot relate back to the original complaint under Rule 7015(c)(2), Federal Rules of Bankruptcy Procedure, which Rule incorporates Rule 15(c)(2), Federal Rules of Civil Procedure; and (2) whether the limitations period in Rule 4004, Federal Rules of Bankruptcy Procedure, can be equitably tolled so as to allow amendment of a tardily filed complaint and thus assure that only an "honest debtor" receives a discharge.

A. Factual Background

In 1986, petitioner Thomas Bertram Dixson ("Dixson") won the Arizona lottery. The lottery paid the prize by purchasing an annuity from an Iowa insurance company. Dixson became

burdened by financial and marital problems and, after a divorce in Arizona, moved in August of 1988 to Florida. In January of 1989, one of Dixson's creditors garnished the proceeds of Dixson's Iowa annuity. Dixson then filed chapter 7 bankruptcy in the Middle District of Florida, Orlando Division, and claimed the proceeds of the annuity as exempt under the provisions of 11 U.S.C. § 522(b)(2) and §§ 222.20 and 222.14, Florida Statutes. Section 222.14, Florida Statutes, exempts proceeds of annuities paid to Florida residents, in any form and in unlimited amounts, from the claims of creditors.

B. The Proceedings Below

The appointed bankruptcy Trustee, respondent Andrea A. Ruff ("Ruff") very quickly moved to obtain control of the funds paid as annuity proceeds. After the meeting of creditors held pursuant to 11 U.S.C. § 341 and examination of the debtor under Rule 2004, Federal Rules of Bankruptcy Procedure, Ruff filed, on the last day available to her under Rule 4004, Federal Rules of Bankruptcy Procedure, a complaint objecting to the Dixson's discharge. That complaint contained five counts asserting claims under 11 U.S.C. §§ 727(a)(2)(B); 727(a)(2)(A); 727(a)(4) (A, B, or D); 727(a)(4) (A or B) and 727(a) (2 and 4) and (c)(1), respectively. All of the counts incorporated allegations which had to do with Dixson's claim of residency in Florida at the time of the filing of the petition in bankruptcy on January 13, 1989. The statutory claims all asserted that Dixson should be denied his discharge by reason of a false claim of Florida residency or a false claim of entitlement to the Florida annuity proceeds exemption: Count I asserted that Dixson knew or should have known that he was not entitled to claim the exemption; Count II asserted that he changed his domicile from Arizona in order to claim the exemption and that such change of domicile was a fraudulent transfer; Count III asserted that Dixson's claimed exemption (dependent upon Florida residency)

constituted a knowing and fraudulent oath, false claim, or withholding of property or information from an officer of the estate; Count IV asserted that Dixson's claim of domicile constituted was a fraudulent and knowing false oath or false claim; and Count V, incorporating all the previous allegations, simply asserted that she believed herself entitled to an order finding the debtor to have committed all the fraudulent acts alleged and denying him his discharge. In an order of December 21, 1989, Bankruptcy Judge Laney dismissed the first three counts. The trustee did not seek to appeal or amend her complaint.

After extensive discovery in Florida and Arizona over the next year, the case was set for trial on Ruff's complaint objecting to Dixson's discharge, which had been consolidated with the claims of Ruff and other creditors objecting to the claimed annuity exemption. The trial was set for July 27, 1990, however, on July 20, 1990, Ruff filed her motion for leave to file an amended complaint. The proposed amended complaint contained eight claims, the first of which reiterated her previously stated claim that Dixson's claim of domicile in Florida constituted a knowing false oath or claim, and his discharge should be barred under 11 U.S.C. § 727(a)(4) (A or B). However, the following seven claims were dependent upon factual allegations that nowhere had appeared in the original complaint, and asserted that Dixson's discharge should be denied because: (1) he had transferred or concealed specific real and personal property with an intent to hinder, delay or defraud creditors; (2) he had concealed, destroyed, mutilated or failed to keep bank account and business records; (3) the answers to certain questions on Dixson's bankruptcy schedules regarding his bank accounts, business activities, transfer of property and omission of addresses constitute a knowing false oath or account or false claim; (4) Dixson knowingly and fraudulently withheld recorded information (unrelated to Dixson's claimed Florida residency)

from an officer of the estate; and (5) Dixson failed to explain satisfactorily a loss or deficiency in his assets. The last two counts of the proposed amended complaint simply assert that Ruff believes herself entitled to an order denying Dixson's discharge; or, if a discharge is granted, to an order revoking the discharge. Judge Corcoran deferred ruling until determination of the issues set for trial on July 27, 1990. At trial, and after conclusion of the trustee's case, Dixson moved for an involuntary dismissal under Rule 41(b), Federal Rules of Civil Procedure. Judge Corcoran took the motion under advisement, but never ruled on it. On September 16, 1992, Judge Corcoran recused himself from the case by reason of a personal dispute with Ruff.

Judge George Proctor was then assigned to the consolidated main case and the adversary proceeding challenging Dixson's discharge. After a hearing, Judge Proctor, at the parties' request, authorized the transcription of the trial transcript. Based upon a review of the trial transcript and exhibits, Ruff's failure to demand recall of any witness whose testimony was material and disputed under Rule 9028, Federal Rules of Bankruptcy Procedure, and the January, 1993, Florida Supreme Court decision in *Lecroy v. McCullom*, 612 So. 2d 572 (Fla. 1993), Judge Proctor rendered his memorandum opinion and accompanying judgments, *Ruff v. Dixson,* 153 B.R. 594 (Bky. M.D. Fla. 1993). Judge Proctor, in a separate judgment, denied Ruff's motion to amend her adversary complaint seeking to deny Dixson his discharge, and making the additional finding that "(a) trial was conducted and the merits of the proceeding have been resolved."

On May 11, 1993, Ruff appealed to the United States District Court for the Middle District of Florida from both the order overruling the claimed exemption for Dixson's annuity proceeds and from the judgment overruling her objections to Dixson's discharge and from the order denying her tardy motion

to amend her complaint seeking to deny Dixson's discharge. On March 12, 1996, United States District Judge Charles M. Metzner affirmed the judgment and orders of Bankruptcy Judge Proctor (App. C at 24a). Ruff then appealed to the Court of Appeals for the Eleventh Circuit.

After oral argument, the Eleventh Circuit filed its unpublished opinion and judgment on May 14, 1997 (App. A at 1a). In its opinion, the Eleventh Circuit ruled on a single issue, *i.e.*, whether Judge Proctor abused his discretion in denying Ruff's motion to amend her adversary complaint seeking to deny Dixson's discharge. It found that this determination made it "unnecessary to address the other issues involved." The Eleventh Circuit then reversed the decisions of the bankruptcy and district courts and remanded the case to the bankruptcy court "to consider anew all of the allegations contained in Ruff's amended complaint." A timely filed motion for rehearing was denied on June 26, 1996. Later, in an order dated August 7, 1997 (App. B at 22a), the Eleventh Circuit clarified its opinion by adding the following to the language determining that it was unnecessary to address the other issues of the case: "We remand for a new trial on the counts asserted in the amended complaint only. After the trial, the trustee may raise on appeal those issues presented in this appeal which we have not addressed, as well as any issues arising out of the second trial." It is from this judgment as clarified by the Eleventh Circuit that certiorari is sought.

The Eleventh Circuit reached its conclusion after determining that Judge Proctor gave no specific reasons why he denied Ruff's motion to amend. After considering its own list of reasons why he might have denied the motion, the Court of Appeals rejected all of them. The Court of Appeals then reviewed whether the allegations of the proposed amended complaint were "completely unrelated" to those of the original complaint. While the Court never found a factual nexus between the allegations

of the original complaint and those underlying the new claims in the proposed amended complaint, it justified permitting the amendment by reason of the involvement of the same sections of the Bankruptcy Code, the similarity of the "underlying theme" of both complaints, and the alleged "extensive fraud" of Dixson. The opinion of the Eleventh Circuit implies that (1) new claims in a proposed amended complaint can relate back to the original complaint without a factual nexus to the original complaint; and (2) Rule 4004, Federal Rules of Bankruptcy Procedure, can be tolled or ignored when there is alleged debtor misconduct, in order to assure that only an "honest debtor" receives a discharge.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH ESTABLISHED PRECEDENT OF THIS COURT, OF OTHER CIRCUITS AND ITS OWN PRECEDENTS REGARDING THE RELATION BACK OF NEW CLAIMS TO THE DATE OF FILING OF THE ORIGINAL COMPLAINT, AND HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR THE EXERCISE OF THE SUPREME COURT'S POWER OF SUPERVISION.

Rule 4004 of the Federal Rules of Bankruptcy Procedure sets an absolute deadline for filing complaints to the discharge of a debtor at 60 days after the initial date set for the meeting of creditors under Section 341 of the Bankruptcy Code, unless a party in interest moves for an extension before the end of the limitations period. Rule 4004(a), 4004(b), Fed. R. Bkr. Pro. Ruff filed her original complaint on the last date available to her under

Rule 4004 and did not seek an extension prior to the end of the limitations period. Rule 15(c)(2) as reflected in opinions of this Court, the Eleventh Circuit and other Circuits have, however, permitted the filing of an amended complaint where the new allegations arose out of the same "conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading," and so would relate back to the time of the original pleading. *See* Fed. R. Civ. Pro. 15(c)(2); *and see Tiller v. Atlantic Coastline R.R.*, 323 U.S. 574, 580, 65 S. Ct 421, 424-425, 89 L. Ed. 465 (1945) *and see Gibson v. Resolution Trust*, 51 F.3d 1016, 1027 (11th Cir. 1995); *Moore v. Baker*, 989 F.2d 1129 (11th Cir. 1993); *Mackensworth v. S.S. Am Merchant*, 28 F.3d 246, 251-252 (2nd Cir. 1994); and *Watkins v. Lujan*, 922 F.2d 261, 265 (5th Cir. 1991). Arising out of the same "conduct, transaction, or occurrence" has always entailed some ***factual*** nexus between the original complaint and the new claims; *see Tiller v. Atlantic Coastline R.R. supra*; *also see Intrepid v. Pollock*, 907 F.2d 1125, 1130 (Fed. Cir. 1990); *O'Loughlin v. Nat'l Railroad Passenger Corp.*, 918 F.2d 24, 26-27 (1st Cir. 1991); *Siegel v. Converters Transportation, Inc.*, 714 F.2d 213, 215-216 (2nd Cir. 1983); *Holmes v. Greyhound Lines, Inc.*, 757 F.2d 1563 (5th Cir. 1985); *and Percy v. San Francisco General Hospital*, 841 F.2d 975, 977-980 (9th Cir. 1988). New claims under different legal theories in a proposed amended complaint which are unsupported by factual allegations in the original complaint will not relate back; *see McGregor v. Louisiana State University Board of Supervisors*, 3 F.3d 850 (5th Cir. 1993), *cert. denied*, 510 U.S. 1131, 127 L. Ed. 2d 415, 114 S. Ct. 1103 (1994). The Eleventh Circuit, in its opinion in the instant case has essentially permitted the amendment of a complaint where the new claims do not arise from the same "conduct, transaction or occurrence" in that there is no factual nexus between the allegations on which the new claims are based and the original complaint, and so cannot relate back under Rule 15(c)(2). The Eleventh Circuit found that the original complaint and the

proposed new claims were linked by an "underlying theme," that of Dixson's alleged "extensive fraud"; however the factual conduct complained of in the original complaint would not support or give notice of the new claims in the proposed amended complaint. It is a far different thing to be accused of falsely claiming Florida residency and of making a fraudulent transfer by moving one's personal residence to Florida than to be accused of (1) transferring or concealing specific personal and real property; (2) concealing, destroying or mutilating records (unrelated to the claim of Florida residence); (3) making false oaths with respect to specific questions on bankruptcy schedules (not related to his claimed annuity exemption); (4) knowingly and fraudulently withholding recorded information (unrelated to the annuity exemption or the claim of Florida residency) from an officer of the estate; and (5) failing to explain satisfactorily a loss or deficiency in his assets. The Eleventh Circuit in its opinion in this case is in conflict with the interpretation of the former Rule 15(c) by this Court in *Tiller, supra* and with widely accepted applications of Rule 15(c)(2) by other Circuit Courts as well as with its own precedent, and the error is a major departure from the accepted and usual course of judicial proceedings.

II.

THE OPINION BELOW CONFLICTS WITH CONTROLLING PRECEDENT OF THIS COURT AND LIKEWISE CALLS FOR THE EXERCISE OF THIS COURT'S SUPERVISORY POWER.

In 1992 this Court decided *Taylor v. Freeland & Kronz*, 503 U.S. 638, 118 L. Ed. 2d 280, 112 S. Ct. 1644 (1992), in which this Court held that a bankruptcy trustee's failure to timely object to a claim of exemption prevented the trustee from later challenging the exemption, even if the debtor had no colorable

statutory basis for claiming the exemption. The Rule of Bankruptcy Procedure in *Taylor* required that objections to exemptions be filed within 30 days after conclusion of the meeting of creditors; *see* Rule 4003(b), Fed. R. Bky. Pro.

As in the situation in *Taylor,* a provision of the Bankruptcy Code, 11 U.S.C. § 727(c)(1), provides for the objection by the trustee, a creditor or the United States Trustee to the discharge of the debtor. Rule 4004, Fed. R. Bky. Pro., provides the manner of objecting and the period of time during which objections must be made. Rule 4004(a) provides that a complaint objecting to discharge must be filed within 60 days after the date set for the first meeting of creditors; Rule 4004(b) provides that any extension of the period must be requested by motion before the expiration of the 60 day period. Finally, Rule 4004, in subsections (c)(1)(b) and (c)(1)(e), provides that in a chapter 7 case, on expiration of the time for filing a complaint objecting to discharge, "the court ***shall forthwith grant a discharge*** (emphasis supplied)" unless a complaint objecting to the discharge has been filed or a motion to extend the time for filing such an objection to discharge is pending. Thus Rule 4004 is more restrictive in its terms than is Rule 4003.

This Court in *Taylor* strictly applied the plain meaning of Rule 4003, the same considerations applied by this Court in *Taylor* to reach its holding, *i.e.,* prompting parties to act and producing finality, which congressional policy is expressed in the Bankruptcy Code in Rules such as 4003 and 4004, are applicable in this case. The Eleventh Circuit has essentially sought to impose its own standard amounting to an equitable tolling of the limitations period in Rule 4004, as well as ignoring the factual nexus or notice requirements for relation back as set forth in Rule 15(c)(2) and discussed above. The Eleventh Circuit in its instant opinion has substituted its own policy considerations for those in *Taylor, i.e.* that permitting Ruff to

file her amended complaint was necessary to give force to the policy that the Bankruptcy Code was intended to provide relief only to the "honest debtor." In *Taylor,* this Court dealt with the Eleventh Circuit's rationale by reciting the penalties faced by debtors and their attorneys for engaging in improper conduct in bankruptcy proceedings and the ability of Congress to enact provisions to remedy the problem if, indeed, there is one; *see Taylor v. Freeland & Kronz, supra at* 503 U.S. 644-645. The decision of the Eleventh Circuit is contrary to and undercuts the policy regarding the strict limitations set forth in the Federal Rules of Bankruptcy Procedure and enunciated by this Court in *Taylor.* The Eleventh Circuit's opinion thus departs from the precedent set in *Taylor* and puts in doubt the strict time limits set by the Federal Rules of Bankruptcy Procedure. For this reason as well, Dixson's petition should be granted.

CONCLUSION

This case presents questions of exceptional importance with regard to Rule 15(c)(2), Federal Rules of Civil Procedure and the Rule 4004, Federal Rules of Bankruptcy Procedure — (1) whether it is enough that a vague "underlying theme" exist with no factual nexus to permit the new claims of a proposed amended complaint to relate back to the original complaint so as to avoid the time limitations of Rule 4004, Federal Rules of Bankruptcy Procedure; and (2) whether time limitations contained in the Federal Rules of Bankruptcy Procedure, in this case Rule 4004, can be tolled in the event the Court suspects the debtor may not be an "honest debtor." This Court and lower courts have already spoken on both questions, and the Eleventh Circuit's decision is a distinct departure from this Court's precedent and accepted law among the various Circuit Courts of Appeal, all of which requires the exercise of this Court's supervisory power. By granting the petition for certiorari, this Court can correct the Eleventh Circuit's contrary opinion.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED MAY 14, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-2391

D. C. Docket Nos. 93-609-CIV-ORL-18
93-610-CIV-ORL-18
89-00105-6P7

ANDREA A. RUFF, Trustee,

Plaintiff-Appellant,

versus

THOMAS BERTRAM DIXSON,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(May 14, 1997)

Before CARNES, Circuit Judge, FAY and CAMPBELL*, Senior Circuit Judges.

FAY, Senior Circuit Judge:

In this bankruptcy appeal, we primarily consider whether

* Honorable Levin H. Campbell, Senior U.S. Circuit Judge for the First Circuit, sitting by designation.

the bankruptcy court abused its discretion in denying the trustee's motion to amend the adversary complaint. On appeal to the district court, the ruling was affirmed. We disagree and reverse.

I. FACTUAL AND PROCEDURAL BACKGROUND

In January of 1986, Thomas Bertram Dixson ("Dixson") and Jodie Dixson ("Jodie"), his wife at the time, won 4.2 million dollars in the Arizona lottery. To pay the Dixsons, the Arizona Lottery Commission purchased a twenty year annuity policy, naming the Dixsons as the annuitants. In October of 1986, Dixson, a manager of an insurance agency, was fired by his employer, Banker's Life of Nebraska, because Dixson's work effort had decreased after winning the lottery.

After winning, Dixson entered into a business relationship with Charles Schwarz, a branch manager at Valley National Bank. In a verbal agreement, Schwarz and Dixson agreed to be equal partners in any future business investment. The future business investments were funded by loans issued by Valley National Bank. The loans were approved by Schwarz and Valley National Bank, in part, because Dixson listed as income the annual lottery payment of approximately $210,000.00. At some point, Dixson became romantically involved with Jill Dreblow, a loan officer at Valley National Bank.[1] On some instances, Dreblow, on behalf of Schwarz, signed loan documents for Dixson.

Dixson also entered into a partnership with John Riecker. This partnership mainly invested in the securities market.

---

1. Around the same time that Dixson began his affair with Jill Dreblow, Dixson's wife Jodie had an affair with Schwarz.

Continuing to rely on his lottery winnings, Dixson made other investments. For example, Dixson invested in a restaurant financed by Kino Plaza. During the summer of 1987, Dixson began experiencing financial difficulties; eventually, all of Dixson's business investments failed. As a result of Dixson's business failures, between 1987 and 1988, various creditors filed suit against Dixson.

As if Dixson's financial woes were not enough of a problem, in February of 1988, Jodie and Dixson became divorced. Pursuant to the terms of the property separation agreement, Dixson received one-half of the annual lottery annuity payment, approximately $105,000.00.

Faced with financial pressure from creditors like Valley National Bank and his failed restaurant business, Dixson consulted his lawyer Richard Schmal about filing for bankruptcy. These consultations concerning bankruptcy occurred as early as 1987. In June of 1988, Dixson decided to move to Florida. Around this same time, Dixson knew upon moving to Florida he would be staying at his parents' house in Longwood, Florida. Prior to moving to Florida, Dixson admits he was aware that Florida provided bankruptcy exemption rights for certain types of annuities.

In preparing to move to Florida, on 25 July 1988, Dixson vacated his apartment and listed his then girlfriend Jill Dreblow's Arizona address as a forwarding address and her phone number as his new phone number. According to Dixson, he did this in order to receive his rent deposit. Before departing to Florida, Dixson told his ex-wife, Jodie, and their two children that he did not know where he was headed. He chose not to tell his children of his destination because of the "pressures" he was

facing from his creditors. He also chose to tell neither his business partner John Riecker nor close friends where he was moving. On 5 August 1988, Dixson moved to Florida. Dixson had previously lived in Florida from 1958 through 1966. His parents resided in Florida and upon his arrival he moved into their home. Dixson states he made the move from Arizona to Florida "to start [his] life over again." On the same day he arrived in Florida, Dixson filed a declaration of domicile listing his parents' home as his new permanent address.

Upon moving to Florida, Dixson immediately began looking for a home to purchase. On 8 September 1988, Dixson signed a blank contract, subject to approval, to purchase a home in Florida. The contract was later approved and Dixson closed on the house on 17 October 1988.

On 8 September 1988, Dixson had his testimony taken by deposition in Arizona in a lawsuit filed by a creditor. At this deposition, when asked his current address, Dixson gave neither his parents' Florida address nor the address of the Florida home that he had signed a contract to buy. Dixson did not give a forwarding address to the United States Postal Service. Instead, Dixson stated as his current address, the Arizona address of his attorney, Rich Schmal.[2]

---

2. Q: Mr. Dixson, what is your current address?

A: Currently, I am using Rich Schmal's. I don't have a home right now so I'm in the process of searching one out. I do check in with Rich periodically. I have no mailing address, other than Rich's mailing address.

Q: Are you currently residing in the state of Arizona?

(Cont'd)

Appendix A

On 12 October 1988, Dixson applied to the State of Arizona for an absentee ballot to vote in the November 1988 presidential election. In the "Request for Application for Absentee Ballot," Dixson listed his former marital home as his Arizona address and Jill Dreblow's Arizona phone number as his phone number. Dixson requested that the absentee ballot be mailed to the Florida address of the home he had contracted to purchase. The form indicated he was voting absentee because he would be absent from his Arizona precinct on the date of the election.

(Cont'd)

A: No.

Q: You don't have an address at the—

A: I don't have a home at this particular time.

Q: Have you decided where you will be living?

A: Yes.

Q: Where is that?

A: Right now, I would just assume leave it, since I can't give you a specific address, since I don't have a specific address. I will leave it with Rich.

Q: Do you expect that your permanent address will be outside the state of Arizona for the future?

A: Yes.

Trial Record Deposition Exhibit 226 at p.5.

Appendix A

In October and most of November 1988, Dixson instructed Schmal not to divulge his Florida address to creditor Kino Plaza. Only when threatened with court sanctions did Dixson permit Schmal to disclose to Kino Plaza his parents' Florida address. At this time, Dixson was not living at his parents' house, but at the home he had purchased.

During the fall of 1988 and early part of 1989, Dixson worked as a car salesman at "The Car House" in Winter Park, Florida. In October 1988, Dixson's fiancee, Jill Dreblow, moved to Florida and lived with Dixson; the two later married in 1989. In October of 1988, Dixson purchased health insurance from a Florida insurance agency, and in January 1989, obtained life insurance from a Florida agency. In February 1989, Dixson obtained a Florida driver's license. From August 1988 to January 1989, Dixson physically resided in Florida, with the exception of approximately fourteen days when he traveled to Phoenix and California.

On 11 January 1989, Dixson filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the Middle District of Florida. The petition was filed after Dixson learned that Valley National Bank had obtained a prejudgment writ of garnishment against the company issuing the annuity payments. Andrea A. Ruff ("Ruff") was appointed trustee of Dixson's estate.

The petition required Dixson to list any bank accounts he maintained within two years of filing the petition Dixson stated he had none, while Dixson's testimony would later demonstrate that he maintained several bank accounts in Arizona and Florida within this period. In the statement of affairs' portion of the petition, Dixson did not answer the question of where he had

been residing for the six years preceding the filing of the petition. Future discovery would later prove that Dixson also omitted certain assets and personal items from the petition.

In the petition, Dixson claimed he had been domiciled in the Middle District of Florida "for the longer portion of the preceding 180 days than in any other district." Pursuant to 11 U.S.C. § 522(b), Florida has opted to provide its residents the bankruptcy exemptions allowed under Florida law rather than the federal bankruptcy exemptions. Fla.Stat.Ann. § 222.20 (West 1989). Utilizing Florida's bankruptcy exemptions, Dixson claimed as a Florida domiciliary that his annual lottery annuity was exempt. Fla.Stat.Ann. § 222.14 (West 1989). Dixson also claimed that his residence and $1,000.00 in personal property were exempt under the Florida Constitution. After filing the petition, Dixson's annuity payment for 1989 was paid to the trustee, Ruff. Ruff, Valley National Bank, and Sun Life Assurance Company each filed objections to Dixson's claimed exemptions.

In Ruff's objection to the annuity exemption, the trustee argued among other reasons, that the lottery annuity is not an annuity entitled to protection under Florida law, Dixson was not a resident or citizen of the State of Florida, and, as such, Dixson could not avail himself of Florida's bankruptcy exemptions, and Dixson's claim of exemption for the lottery annuity would be a fraud upon creditors of the estate.

In addition to objecting to Dixson's claimed exemptions, Ruff also filed a separate five count adversary complaint against Dixson seeking to deny Dixson's discharge. Ruff filed the complaint on the next to last day available to her. F.R.B.P. 4004. In count one of the complaint, Ruff alleges Dixson's claim of

exemption for the lottery annuity was fraudulent, intending to delay or defraud his creditors. 11 U.S.C. § 727(a)(2)(B). In count two, Ruff claims Dixson's change of domicile from Arizona to Florida was a fraudulent transfer of the annuity proceeds. 11 U.S.C. § 727(a)(2)(A). Count three alleges that Dixson's claim of exemption of annuity proceeds constitutes a knowing, fraudulent false oath. 11 U.S.C. § 727(a)(4)(A)–(B),(D). Ruff asserts in count four that Dixson's claim of domicile in Florida constitutes a false oath or false claim to that status for the period preceding the filing of the petition in this case. 11 U.S.C. § 727(a)(4)(A)–(B). The fifth cause of action raised by Ruff generally realleges counts one through four and relies on 11 U.S.C. § 727(c)(1), which gives a trustee the right to object to the granting of a discharge.

Dixson filed a motion to dismiss the complaint. Bankruptcy Judge Laney granted Dixson's motion to dismiss the first three counts of the complaint, but denied Dixson's motion as to counts four and five. As to Ruff's allegation that Dixson's change of domicile to claim the annuity exemption was made with the intent to defraud his creditors, the bankruptcy judge found that Dixson "has a constitutional right to travel and is free to change his domicile as he sees fit." The bankruptcy judge added that "pre-bankruptcy planning alone will not render the transfer of non-exempt property into exempt property fraudulent which in turn would warrant a denial of [Dixson's] discharge."

In denying Dixson's motion to dismiss count four of the complaint, the bankruptcy judge found that there are disputed facts whether Dixson "actually changed his domicile from Arizona to Florida on the particular dates in question." Since the fifth count reiterated the previous four claims, the only remaining issue was whether Dixson's claim of domicile constituted a knowing and fraudulent false oath or claim.

Appendix A

The bankruptcy court consolidated for purposes of discovery and a trial, Ruff's, Valley National Bank's, and Sun Life's objections to Dixson's claimed exemptions and the remaining claim of Ruff's complaint, count four. A trial was set for 27 July 1990. One week prior to the start of the trial, Ruff filed a "Motion for Leave to Amend Complaint" on the ground that newly discovered evidence had been fraudulently concealed by Dixson.

After conducting discovery, Ruff claims the evidence illustrates Dixson failed to list bank accounts that he maintained within two years of filing his petition and that Dixson fraudulently transferred or concealed certain assets. Some of this evidence was not discovered until June and July of 1990. According to Ruff's brief, some of the bank account records were not discovered until the court, on 13 July 1990, ordered Dixson to produce the records by 18 July 1990.[3] The motion to amend the complaint, with the eight count amended complaint attached to the motion, was filed on 20 July 1990.

In count one of the amended complaint, Ruff alleges Dixson's claim of Florida domicile for the period preceding the filing of his petition constitutes a false oath or claim. 11 U.S.C. § 727(a)(4)(A)–(B). In count two, Ruff claims Dixson transferred certain property in 1988 with the intent to hinder, delay or defraud either his creditors or trustee. 11 U.S.C. § 727(a)(2)(A)–(B). Count three asserts that Dixson concealed bank account records and business records from which Dixson's financial condition could be ascertained. 11 U.S.C. § 727(a)(3). Ruff

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3. A review of the docket sheet does not list a written order for 13 July 1990 requiring Dixson to disclose his bank account records. We assume it was oral.

asserts in count four that the omission of certain information from Dixson's bankruptcy schedules constitutes a false oath or false claim. 11 U.S.C. § 727(a)(4)(A)–(B). Count five alleges that Dixson withheld recorded information from an officer of the estate who is entitled to such information under 11 U.S.C. § 727(a)(4)(D). Dixson's alleged failure to satisfactorily explain his loss of assets or deficiency of assets to meet the debtor's liabilities makes up count six. 11 U.S.C. § 727(a)(5). Count seven reincorporates the previous counts. 11 U.S.C. § 727(a)(2)–(5),(c)(1). As an alternative in the event the bankruptcy court were to grant Dixson a discharge, Ruff in count eight relies on 11 U.S.C. § 727(d), which allows a court to revoke a discharge if the discharge was obtained through the fraud of the debtor.

Bankruptcy Judge Corcoran deferred ruling on the motion to amend the complaint "until after the determination of issues now set for trial on July 27, 1990."

Bankruptcy Judge Corcoran conducted a three day bench trial on the consolidated matters. During the course of the trial, Dixson testified that he maintained several bank accounts two years prior to filing his petition, but in omitting this information from his bankruptcy schedules, Dixson stated he did not know that the section of the bankruptcy schedules requesting information on "accounts or certificates of deposit or shares in banks, savings and loan, thrift . . ." meant to include bank accounts.

Dixson also testified that in connection with applying for a loan with Valley National Bank he listed BPC Properties as an asset worth $15,000.00, but failed to disclose this information in his bankruptcy schedules.

Appendix A

At the conclusion of Ruff's case, Dixson, under Fed.R.Civ.P. 41(b), moved for an involuntary dismissal of both the objections to the claimed exemptions and count four of the complaint. *See* F.R.B.P. 7041. Bankruptcy Judge Corcoran stated he would rule on Dixson's Rule 41(b) motion or continue the trial with the presentation of Dixson's case after he read deposition excerpts submitted by Ruff as part of the trustee's case in chief. However, the bankruptcy judge did comment from the bench that, subject to reading the depositions, his feeling was that Dixson was a Florida resident. Bankruptcy Judge Corcoran never issued a ruling on Dixson's Rule 41(b) motion nor on Ruff's motion to amend the complaint. Almost two years elapsed with no judicial action.

On 7 May 1992, Ruff filed a motion for disqualification of Bankruptcy Judge Corcoran from all her cases. On 16 September 1992, Bankruptcy Judge Corcoran entered an order voluntarily recusing himself from this case (and many others). Bankruptcy Judge Proctor was assigned the consolidated objections to the claimed exemptions and Ruff's complaint to deny Dixson's discharge. More than two years after Bankruptcy Judge Corcoran had conducted the trial in this case, Bankruptcy Judge Proctor held a status conference. At the status conference, Ruff requested a new trial because she believed Bankruptcy Judge Proctor needed to determine the credibility of the witnesses.

On 3 May 1993, without conducting a new trial, F.R.B.P. 9028 and Fed.R.Civ.P. 63, Bankruptcy Judge Proctor issued his "Memorandum Opinion." *See In re Buff*, 153 B.R. 594 (Bankr. M.D. Fla. 1993). In the opinion, Bankruptcy Judge Proctor, pursuant to F.R.B.P. 9028 and Fed.R.Civ.P. 63, certified he was familiar with the record and concluded that credibility of the

witnesses was not a concern.[4] After reviewing the record, the bankruptcy judge made the following finding of fact:

> From August, 1988, through January, 1989, [Dixson] not only failed to state affirmatively to friends, family, and business associates that he intended to reside in Florida, but he intentionally withheld such information in an effort to conceal his location from his creditors and his ex-wife.

In re Ruff, 153 B.R. at 596. Based on the factual record, the bankruptcy judge concluded that Dixson was a Florida domiciliary entitled to utilize Florida's bankruptcy exemptions:

> Despite the fact that debtor concealed his location to avoid his ex-wife and creditors, he was domiciled in Florida for the greater part of 180 days immediately preceding the date of the filing of the petition and is entitled to avail himself of the exemptions to which Florida residents are entitled.

In re Ruff, 153 B.R. at 597. In accordance with the finding that Dixson was a Florida domiciliary, the bankruptcy judge found that count four of the complaint should be "overruled" or dismissed because Dixson's claim of domicile did not constitute a false oath. *In re Ruff*, 153 B.R. at 599.

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4. Ruff contends the bankruptcy court "lost" her trial exhibits, and, consequently Bankruptcy Judge Proctor did not review any of Ruff's trial exhibits before issuing his Memorandum Opinion Judge Proctor, however, has certified that he has reviewed the complete record and we accept this certification.

Having decided that Dixson was a Florida domiciliary entitled to use Florida's exemption laws, the bankruptcy judge ruled as a matter of law that a lottery annuity is exempt from creditors' claims in bankruptcy under Fla.Stat. § 222.14. *Id.*[5] To reach this legal conclusion, the bankruptcy judge relied on the Florida Supreme Court's answer in *In re McCollam*, 612 So.2d 572 (Fla. 1993), to a question certified by this Court in *In re McCollam*, 955 F.2d 678 (11th Cir. 1992).

In two separate orders issued on the same day as the Memorandum Opinion (3 May 1993), Bankruptcy Judge Proctor summarily denied Ruff's outstanding motion to amend the complaint, and entered final judgment overruling Ruff's objections to the discharge and consequently issuing a discharge to Dixson. Because Bankruptcy Judge Proctor's various orders disposed of both the complaint and the objections to Dixson's claimed exemptions, Ruff filed two notices of appeal to the district court. The district court consolidated the two appeals.

In the consolidated appeals to the district court, Ruff raised four issues in her brief. First, Ruff contended that the bankruptcy judge erred as a matter of law in finding that Dixson was a Florida resident entitled to claim Florida's exemptions when he intentionally concealed his Florida addresses from his creditors and applied for an absentee ballot in Arizona. Secondly, Ruff argued that the failure of Bankruptcy Judge Proctor to consider trial exhibits and observe witnesses' credibility "mandate[s] a

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5. Based on the finding that Dixson was a Florida domiciliary, the bankruptcy judge overruled the parties' objections as to the homestead exemption. *Ruff*, 153 B.R. at 598. However, the bankruptcy judge disallowed Dixson's claim of exemption for $1,000.00 in personal property because Dixson failed to specify the property claimed as exempt. *Ruff*, 153 B.R. at 599.

new trial or alternatively whether the district court's standard of review is *de novo*." The next issue asserted by Ruff was whether the bankruptcy judge erred as a matter of law in concluding that a lottery annuity is exempt under Florida law. Finally, Ruff appealed the bankruptcy judge's denial of her motion to amend the complaint. In affirming the bankruptcy judge's orders, the district court dismissed each of Ruff's arguments.

In rejecting Ruff's appeal of Bankruptcy Judge Proctor's order denying her motion to amend the complaint, the district court stated:

> The issue is tested by the abuse of discretion rule. The original complaint was filed one day before the last day for filing such a complaint. Then, over 14 months later, and a few days before the trial date, the request for leave to amend is submitted. The amendments are completely unrelated to the factual material included in the original complaint. This is not a case of a new or alternative theory of preventing discharge. It is a separate and independent factual basis for preventing discharge. Further, pretrial discovery may well be necessary and this trial adjourned to accommodate such request. In the circumstance, I find that the court did not abuse it[s] discretion in denying the motions.

District Court's March 12, 1996, Order at p. 4. Ruff timely appealed to this Court the district court's affirmance of the bankruptcy judge's orders.

On appeal to this Court, Ruff advances a number of issues. Included among these issues is whether the bankruptcy judge abused its discretion in denying Ruff's motion to amend the complaint. Because we conclude that the bankruptcy court did abuse its discretion in denying Ruff's motion, we find it unnecessary to address the other issues raised.

II. STANDARD OF REVIEW

"Because the district court functions as an appellate court in reviewing bankruptcy court decisions, this court is the second appellate court to review bankruptcy court cases." *In re Glados, Inc.*, 83 F.3d 1360, 1362 (11th Cir. 1996) (citing *In re Haas*, 31 F.3d 1081, 1083 (11th Cir. 1994), *cert. denied*, __ U.S. __, 115 S.Ct. 2578, 132 L.Ed.2d 828 (1995)). In reviewing a district court's decision affirming the decision of a bankruptcy court, the court of appeals is governed by the same standards of review as those that governed the district court. *In re Club Associates*, 951 F.2d 1223, 1228 (11th Cir. 1992); *see also In re Sublett*, 895 F.2d 1381, 1384 n.5 (11th Cir. 1990). The district court applied an abuse of discretion standard of review in affirming the bankruptcy judge's denial of Ruff's motion to file an amended complaint. District Court's March 12, 1996, Order at p. 4; *see Motorcity of Jacksonville Ltd. v. Southeast Bank*, 83 F.3d 1317, 1323 (11th Cir. 1996), *cert. granted and judgment vacated on other grounds by, Hack v. F.D.I.C.*, __ U.S. __, 117 S.Ct. 760 (1997). In *Foman v. Davis*, 371 U.S. 178 (1962), the Supreme Court commented on the discretion a court has to grant or deny a motion to amend:

> Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal

> to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

Foman, 371 U.S. at 182.

III. DISCUSSION

Bankruptcy Rule 7015 states that Fed.R.Civ.P. 15, which governs the amendment of pleadings, is applicable in bankruptcy proceedings. Fed.R.Civ.P. 15, provides in part, that after a responsive pleading has been filed, subsequent amendments are permissible only with leave of court, which "shall be freely given when justice so requires." Fed.R.Civ.P. 15(a). "This liberal policy of allowing amendments under Rule 15(a) 'circumscribes the exercise of the district court's discretion; thus, unless a substantial reason exists to deny leave to amend, the discretion of the district court is not broad enough to permit denial.' " *Motorcity of Jacksonville Ltd. v. Southeast Bank*, 83 F.3d 1317, 1323 (11th Cir. 1996), *cert. granted and judgment vacated on other grounds by*, *Hess v. F.D.I.C.*, __ U.S. __, 117 S.Ct. 760 (1997) (quoting *Shipner v. Eastern Air Lines, Inc.*, 868 F.2d 401, 407 (11th Cir. 1989)); *see also Moore v. Baker*, 989 F.2d 1129, 1131 (11th Cir. 1993) (holding that "a justifying reason *must be apparent* for denial of a motion to amend") (emphasis added); *Nolin v. Douglas County*, 903 F.2d 1546, 1550 (11th Cir. 1990) ("While the district court is accorded discretion in arriving at its decision, a justifying reason must be apparent for denial of a motion to amend.").

In our case, Bankruptcy Judge Proctor gave no reason for

denying Ruff's motion. The order simply stated that "[t]he Court originally deferred ruling on the motion by order dated July 30, 1990. A trial was conducted and the merits of the proceeding have been resolved. It is ORDERED: Plaintiff's Motion to Amend the Complaint is denied." Because no reason was given by the bankruptcy court, we review the record to determine whether a justifying reason is apparent.

In determining whether a justifying reason exists to deny Ruff's motion, we may consider such factors as "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc. . . . ." *Foman*, 371 U.S. at 182.

After reviewing the record, the arguments advanced by Dixson, and the district court's opinion, we believe there are two reasons which emerge that could arguably support the denial of Ruff's motion to amend the complaint. First, the untimely filing of Ruff's motion, one week before the trial was set to begin. And, second, the claims in the amended complaint are "completely unrelated" to the claims advanced in the complaint. For the reasons that follow, we dismiss both of these arguments and find that the denial of Ruff's motion to amend the complaint was an abuse of discretion.

We acknowledge that if Bankruptcy Judge Corcoran had denied Ruff's motion to amend the complaint at the time the motion was filed (one week before the trial was set to begin), the timing of Ruff's request could have been seen as a reason to deny the request. Indeed, the district court seems to partly base its affirmance of Bankruptcy Judge Proctor's ruling on the late

timing of Ruff's request. ("The original complaint was filed one day before the last day for filing such a complaint. Then, over 14 months later, and a few days before the trial date, the request for leave to amend is submitted.") However, Ruff's motion was not denied by Bankruptcy Judge Corcoran at the time it was submitted. Instead, Bankruptcy Judge Corcoran deferred ruling on the motion "until after the determination of the issues now set for trial on July 27, 1990." Thus, while Bankruptcy Judge Corcoran could have ruled upon the motion, he did not. Instead, Bankruptcy Judge Corcoran seemed to suggest that he would conduct a trial and if the evidence conformed to the issues raised in the amended complaint he would be inclined to grant the motion. Thereafter, a three day trial was conducted.

The evidence presented at trial was related to the issues raised in Ruff's amended complaint. Dixson testified that he maintained bank accounts two years before filing the petition that were not disclosed in his schedules. Dixson also testified about not listing certain assets and personal items. There was testimony and evidence concerning the withholding of much relevant and required information. Given Bankruptcy Judge Corcoran's stated reason for deferring ruling on the motion, we believe the record provides support for the allegations in the amended complaint. However, Bankruptcy Judge Proctor's Opinion does not address any of the claims raised in the amended complaint nor any of the evidence in support thereof. Instead, the Opinion focuses solely on the remaining count of the complaint and the objections to Dixson's claimed exemptions.

In any event, Bankruptcy Judge Proctor denied the motion, and not Bankruptcy Judge Corcoran. The denial came almost *three years* after Ruff originally filed the motion. The late timing of the motion was not given as a basis for the ruling. In fact, no

reason is given for Bankruptcy Judge Proctor's denial, other than "[a] trial was conducted and the merits of the proceeding have been resolved."

Considering the timing of the motion to amend and the question of "delay" in the light most favorable to the rulings, we conclude that such is not a valid basis. It is undisputed that this "undue delay" was the result of Dixson's failure to honestly disclose all of his bank accounts in Florida and Arizona as required by law. On 13 July 1990, the court had to order Dixson to produce certain bank records by 18 July 1990. Had Dixson been more honest in his schedules and during discovery, the motion may not have been filed one week before trial. In other words, to reward Dixson by denying Ruff's motion because of its timing, stands the law on its head. To hold otherwise would encourage debtors to purposely withhold information from petitions and schedules in order to cause a trustee to miss the deadline of filing a complaint to deny discharge. F.R.B.P. 4004.

In addition, the lengthy lapse of time between the time the motion was filed and the time Bankruptcy Judge Proctor ultimately ruled, convinces us that the denial was an abuse of discretion. Almost three years elapsed between filing and disposition. The cursory denial of Ruff's motion after such an extended period of time is an abuse of discretion. While some of this time lapse may be attributed to the difficulties between Ruff and Bankruptcy Judge Corcoran, that is not a justifying reason to deny Ruff's motion and punish the creditors of Dixson's estate. Ruff's request that Bankruptcy Judge Corcoran recuse himself was not frivolous and indeed resulted in a reassignment of the case.

As to the other possible ground to deny Ruff's motion, that

the claims raised in the amended complaint "are completely unrelated to the factual material included in the original complaint," we simply disagree.

Both complaints are based on the same sections of the Bankruptcy Code. 11 U.S.C. § 727(a)(2)(A)–(B),(a)(4)(A)–(B),(D). These sections seek to provide a statutory basis to deny a discharge to the dishonest debtor. This Court has previously stated that "the bankruptcy laws are designed to provide relief for the honest but unfortunate debtor." *Birmingham Trust Nat. Bank v. Case*, 755 F.2d 1474, 1477 (11th Cir. 1985) (citing *Brown v. Felsen*, 442 U.S. 127, 128, 99 S.Ct. 2205, 2207, 60 L.Ed.2d 767 (1979)). "Congress provided for nondischargeability in order that dishonest debtors would not benefit from their wrongdoing. 'The debtor attempting to abuse the proceedings of bankruptcy is not entitled to the complete medley of Bankruptcy Code protections. The Bankruptcy Code thereby attempts to discourage such abuse.' " *In re Collins*, 946 F.2d 815, 817 (11th Cir. 1991) (quoting *Transouth Financial Corp. of Florida v. Johnson*, 931 F.2d 1505, 1508 (11th Cir. 1991)).

In both complaints, the underlying theme is that Dixson's discharge should be denied because of extensive fraud. While some of the factual allegations in the complaints differ, as we have already stated, this difference is apparently a direct result of Dixson's unwillingness to be candid and forthcoming in filling out his petition and during the course of discovery.

We have consistently denied a debtor his discharge where the debtor deliberately omitted items from his schedules or made a false oath in connection with the bankruptcy proceeding. *See In re Hawley*, 51 F.3d 246, 248-49 (11th Cir. 1995) (denying discharge because debtor failed to satisfactorily explain the loss

of his assets under 11 U.S.C. § 727 (a)(5)); *Swicegood v. Ginn*, 924 F.2d 230, 231-32 (11th Cir. 1991) (denying discharge because debtor omitted a few personal items from his schedule under 11 U.S.C. § 727(a)(4)(A)); *In re Davis*, 911 F.2d 560, 561-62 (11th Cir. 1990) (denying discharge because debtor's transfer of property was made with the intent to hinder, delay, or defraud a creditor under 11 U.S.C. § 727(a)(2)(A)); *In re Chalik*, 748 F.2d 616, 618-19 (11th Cir. 1984) (denying discharge because debtor omitted from his schedules certain corporations with which he was associated or in which he held stock under 11 U.S.C. § 727(a)(4)(A)). In this case, the evidence presented at trial revealed that Dixson omitted various items from his schedules. These "omitted" items constitute a viable cause of action under 11 U.S.C. § 727 and were alleged in Ruff's amended complaint. Under the circumstances that existed here, the bankruptcy court should have allowed the amended charges and ruled upon the merits of those allegations.

IV. CONCLUSION

For the foregoing reasons, we find that the bankruptcy judge abused his discretion in denying Ruff's motion to amend the complaint. Accordingly, we reverse the decisions of the bankruptcy and district courts and remand the case to the bankruptcy court to consider anew all of the allegations contained in Ruff's amended complaint.

REVERSED AND REMANDED for further proceedings consistent with this opinion.

APPENDIX B — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED AUGUST 7, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-2391

ANDREA A. RUFF, Trustee,

Plaintiff-Appellant,

versus

THOMAS BERTRAM DIXSON,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida

Before CARNES, Circuit Judge, FAY and CAMPBELL, Senior Circuit Judges.

BY THE COURT:

Appellant's motion for clarification of this court's opinion is granted. The court's opinion is amended by adding the following language to the first full paragraph of page 15 which ends ". . . unnecessary to address the other issues raised."

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* Honorable Levin H. Campbell, Senior U.S. Circuit Judge for the First Circuit, sitting by designation.

Appendix B

We remand for a new trial on the counts asserted in the amended complaint only. After the trial, the trustee may raise on appeal those issues presented in this appeal which we have not addressed, as well as any issues arising out of the second trial.

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION DATED MARCH 12, 1996

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CONSOLIDATE CASE NUMBERS:
93-609-CIV-ORL-18
93-610-CIV-ORL-18

BANKRUPTCY CASE NUMBER:
89-00105-6P7

ANDREA A. RUFF, Trustee,

Appellant,

v.

THOMAS BERTRAM DIXSON,

Appellee.

MEMORANDUM AND ORDER

We are considering two appeals from determinations made by Bankruptcy Judge Proctor.

Appeal I is taken by the trustee from an order overruling her objection to the debtor's claim of exemption for an annuity.

Appeal II is taken by the trustee from a judgment overruling

her objection to the discharge of the debtor, and from an order denying her motion to amend the complaint.

The complaint originally alleged five causes of action objecting to the discharge of the debtor. They were predicated on Section 727(a)(2)(A) and (B), and Section 727(a)(4)(A) and (B) of the Bankruptcy Code. The debtor's motion to dismiss the complaint was granted to the extent of striking the first three claims. The fourth and fifth claims presented the sole issue to be tried. This was the allegation that the debtors claim of domicile in Florida "constitutes a knowingly fraudulent oath or false claim to that status."

No appeal was taken from the order of dismissal.

The order overruling the objection to the claim for exemption and the judgment overruling the objection to the discharge will be discussed together. All the issues raised on the two appeals are discussed in one brief.

The first claim is that the court below erred as a matter of law in sustaining the debtor's claim for exemption of his annuity because he intentionally concealed his Florida address from creditors and because he applied for an absentee ballot in Arizona. The trustee contends that these two actions show that the debtor never intended to be a resident of Florida, at least for 91 days prior to filing his petition in bankruptcy.

These actions, neither singly nor collectively warrant a finding, as a matter of law, that the debtor was not a Florida resident for the required period of time. Of course, they were factors to be considered by the court below in deciding the issue of residence. However, there were favorable factors brought to

the court's attention during the hearing and it cannot be said that the decision was clearly erroneous as a matter of law.

The second issue is couched in terms of prejudice and bias, omissions in the transcript, trial exhibits not being sent to the bankruptcy judge who decided the case, and the failure of that judge to observe the witnesses where credibility is an issue. The trustee claims that these factors "mandate a remand for a new trial or alternatively whether the district court's standard of review is *de novo*."

The standard of review is not *de novo* since, if the claims of the trustee are correct, personal presence of the trier of the fact at the presentation of the testimony is imperative.

The bankruptcy judge to whom the case was originally assigned, recused himself after completion of the trial but before decision. There are no indications from the trustee as to adverse actions during the trial by that bankruptcy judge which resulted from bias. Bankruptcy Judge Proctor was assigned the matter for determination. There is no allegation that he was biased or prejudiced in his handling of the case.

The trustee alleges that an exchange between her and the original bankruptcy judge was omitted from the transcript. Assuming that these few lines were omitted, a reading of the trustee's version of the exchange adds nothing to the case. It may be another example of his claimed bias, but obviously, it would have no impact on Bankruptcy Judge Proctor.

The trustee claims that Bankruptcy Judge Proctor did not have the trial exhibits before him when he decided the matter on May 3, 1993. The trustee relies on a memorandum from the

clerk to her dated September 20, 1993, which states that "to the best of my knowledge, I have not forwarded any plaintiff exhibit files to Judge Proctor for review prior to his entering his decision." This is written four months after the judge certified that he was familiar with the record and that the issues could be resolved on the record because credibility "is not a concern." Bankruptcy Rule 9028.

I cannot understand why this should be an issue on this appeal. Counsel had ample time from receipt of the Clerk's memorandum on September 20, 1993, to clear up the matter with a simple telephone call to the court's chambers. I will rely on the judge's certification.

Finally, on this second issue, the trustee contends that the second bankruptcy judge should have conducted a trial *de novo.* The trustee refused the opportunity to reopen the case for additional testimony. There appears to be no dispute as to the facts. The dispute goes to the court's determination based on the available testimony. Under the circumstances the conduct of a second trial would not be helpful, but only a waste of time. It is just for this reason that F.R. Civ. P. 63 was adopted and is used by the courts.

The third issue raised by the trustee is that the court below erred as a matter of law in holding that the annuity was exempt under Florida law. Under the decision by the Supreme Court of Florida *In re McCollam,* 612 So. 2d 572 (1993) this annuity is clearly exempt.

The trustee claims that the court below erred in denying her motion for leave to amend her complaint.

Appendix C

On May 8, 1989, the complaint was filed. On July 20, 1990, a few days before trial, the trustee made her motion to amend. It was predicated on information obtained in pre-trial discovery and charged that the debtor had lied on his bankruptcy schedules as to eight specific items. None of these items related to the thrust of the original complaint that Dixson was not a resident of Florida and therefore not entitled to the annuity exemption.

F.R.Civ. P. 15(a) provides that this pleading could only be amended by leave of court which "shall be freely given when justice so requires."

This issue is tested by the abuse of discretion rule. The original complaint was filed one day before the last day for filing such a complaint. Then, over 14 months later, and a few days before the trial date, the request for leave to amend is submitted. The amendments are completely unrelated to the factual material included in the original complaint. This is not a case of a new or alternative theory of preventing discharge. It is a separate and independent factual basis for preventing discharge. Further, pretrial discovery may well be necessary and this trial adjourned to accommodate such request. In the circumstance, I find that the court did not abuse its discretion in denying the motions.

The judgment and orders are affirmed.

SO ORDERED

s/ Charles M. Metzner
CHARLES M. METZNER
SENIOR UNITED STATES DISTRICT JUDGE

Appendix C

March 12, 1996

Copies to: Judge Sharp
Bankruptcy Court
Counsel of Record

APPENDIX D — MEMORANDUM OPINION OF THE UNITED STATES BANKRUPTCY COURT FOR THE MIDDLE DISTRICT OF FLORIDA, JACKSONVILLE DIVISION DATED MAY 3, 1993

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION.

CASE NO. 89-105-BKC-6X7

ADV. NO. 89-93

In re THOMAS BERTRAM DIXSON,

Debtor.

ANDREA A. RUFF, TRUSTEE,

Plaintiff,

v.

THOMAS BERTRAM DIXSON,

Defendant.

MEMORANDUM OPINION

The chapter 7 trustee, Andrea A. Ruff, and two creditors, Sun Life Assurance Company of Canada ("Sun Life") and Valley National Bank ("Bank"), objected to debtor's claims of exemption for lottery winnings paid by annuity and for his Florida residence.

In the context of the adversary complaint, the trustee objected to the discharge of the debtor on the following theories:

(1) the debtor claimed the annuity as exempt with the knowledge that such an annuity was excluded from the exemption provision and that the claim of exemption was, in itself, made with intent to hinder, delay or defraud his creditors; (2) that the change of domicile constituted a fraudulent transfer of the annuity proceeds; (3) that the claim of exemption for the annuity constituted a false oath, false claim or withholding of property or information relative to property of the estate; (4) that the claim of domicile in Florida before January, 1989, was a fraudulent and knowing false oath or claim; and (5) that the acts alleged in Counts 1–4 constituted grounds for denying the discharge under § 727(a)(2) and (4).

The Court consolidated the contested matters and the adversary proceeding for purposes of discovery and trial.

Debtor moved to dismiss the adversary complaint and by order entered on December 27, 1989, the Court granted the motion as to the first three of claims of the trustee. Since the fifth claim reiterated the previous claims, the only ground for relief remaining in the adversary was that debtor's claim of domicile constituted a knowing and fraudulent false oath or claim.

Prior to the trial, debtor filed motions for summary judgment claiming that, as to each of the issues, no dispute of material fact existed and that a determination could be made as a matter of law. The Court reserved ruling on the summary judgment motions, and a trial was conducted on July 27, 28, and 30, 1990.

At the consolidated trial, trustee presented her case-in-chief, upon which the other objecting parties relied, adopting the evidence as their own. Debtor then made a motion for involuntary

dismissal pursuant to F.R.B.P. 7041 and F.R.Civ. P. 41(b) arguing that the trustee's and objecting parties' evidence was legally insufficient.

Judge Corcoran recused himself from this case and proceeding on September 16, 1992, and pursuant to Local Rule 1.04(b)(2) both matters were assigned to the judge resident in the Jacksonville Division. Pursuant to F.R.B.P. 9028, the undersigned certifies that he is familiar with the record. Further, having concluded that credibility is not a concern, the Court determines that the issues may be resolved on the record without prejudice to the parties.

Upon the evidence presented, the Court enters the following Memorandum Opinion:

FACTS

Debtor lived in Florida from 1958 through 1966 and returned to the Orlando area after being discharged from military service. He remained in Orlando until 1977. Subsequently, he moved to Arizona, where he resided for the nine years prior to August of 1988.

In January of 1986, debtor and his former wife won the Arizona lottery. The State of Arizona, in satisfaction of its obligations, purchased an annuity contract from the Central Life Assurance Company of Des Moines, Iowa ("annuity").

For the years 1986, 1987, and 1988, debtor and his former wife received the proceeds of the annuity. During 1986, however, they began to experience marital problems and debtor moved out of the marital home. The two were divorced the following

year and the final judgment provided that each would received one-half of the yearly annuity proceeds.

Also during 1987, debtor began experiencing severe financial difficulties arising from unsuccessful business ventures. Pressure from various lender and financial institutions mounted during the first six months of 1988. In fact, debtor was named as a defendant in several lawsuits.

On July 25, 1988, debtor informed his Phoenix apartment complex that he intended to vacate his premises as of August 23, 1988. The notice indicated that his forwarding address was c/o Jill Dreblow, 4215 North 17th Street, number 18, Phoenix, Arizona, and listed Jill Dreblow's telephone number.

Debtor drove from Arizona to Florida on August 3, 1988. He initially resided with his parents in Longwood, Florida. His brother and other family members also lived in the central Florida area.

Before traveling to Florida, debtor consulted his Arizona attorney and friend regarding the possibility of filing bankruptcy and was advised concerning Florida statutory exemptions.

Debtor was physically present in the State of Florida from August 3, 1988, through January 11, 1989, with the exception of approximately 14 days in August and early September. During that two week period, he traveled to California and Phoenix on vacation with his children and friends. He also met with the Federal Bureau of Investigation concerning actions of his former business partner and an officer of Valley National Bank and attended a deposition related to litigation in which he was involved.

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On August 5, 1988, debtor filed a declaration of domicile with the Clerk of the Court of Seminole County, Florida, indicating that he was maintaining his permanent home and place of abode at 101 Wild Hickory Land, Longwood, Florida, his parents' home.

From August, 1988, through January, 1989, debtor not only failed to state affirmatively to friends, family, and business associates that he intended to reside in Florida, but he intentionally withheld such information in an effort to conceal his location from his creditors and his ex-wife.

After moving to Florida, debtor refused to give any specific address during a deposition and refused to disclose his address until the day before a hearing on a motion to compel discovery. At that time debtor authorized his attorney to reveal the address given in his declaration of domicile. Debtor also did not give a forwarding address to the postal service upon leaving Arizona.

Shortly after arriving in Florida, debtor found employment as a salesman with The Car House in Winter Park, Florida. His earnings as a salesman were substantially below his average income as an insurance agency manager, the occupation he had pursued prior to winning the lottery.

Debtor opened a checking account with Sun Bank in Longwood, Florida, in August of 1988. However, he also remained as a signatory on various business and personal bank accounts in Arizona for several months after his move.

In October of 1988, debtor's fiancee, Jill Dreblow, left her job of several years in Phoenix and moved to Florida to live with debtor. The two were married the following year.

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Debtor contracted to purchase a condominium at 422 Stanton Place, Longwood, Florida, on September 9, 1988, where he and his current wife have resided since the sale closed in October, 1988.

On October 12, 1988, debtor requested an absentee ballot from Maricopa County, Arizona in order to vote in the presidential election on November 6, 1988. His request stated that he was "resident at" the address of 2614 East Mercer Lane in Phoenix, Arizona (his former marital home), and gave Jill Dreblow's Phoenix number as his current telephone number. The form indicated that he was voting absentee because he would be absent from his Arizona precinct on the date of the election.

On October 1, 1988, debtor purchased health insurance, as required under his divorce agreement, from a Florida agency. The following January, he purchased term life insurance naming his children and second wife as beneficiaries, also from a Florida agency.

On January 11, 1989, after learning that the Bank had obtained a prejudgment writ of garnishment against the company issuing the annuity payments, debtor filed a chapter 7 petition in the Bankruptcy Court for the Middle District of Florida.

On his B-4 schedule, debtor claimed as exempt property his house, the annuity, and personal property of $1,000.00.

On February 10, 1989, debtor obtained a Florida drivers license. Two weeks later he registered to vote in Seminole County, Florida.

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DISCUSSION

The principal issue of fact remaining to be determined is whether the debtor was a Florida resident or domiciliary for the greater portion of 180 days preceding the filing of the petition.

A. Domicile

Under Florida law, "where good faith intention is coupled with an actual removal evidenced by positive overt acts, then the change of residence is accomplished and becomes effective." *Bloomfield v. St. Petersburg Beach*, 82 So.2d 364, 368 (Fla. 1955). Upon the evidence presented, it is clear that debtor not only physically removed himself to Florida, but that he had the intent to remain in Florida for an unlimited time. This intention was fully supported by the overt acts taken in establishing his residency of record; causing his fiancee to terminate her long-held Phoenix employment and move to Florida; purchasing a home; opening bank accounts; buying insurance; and obtaining a job.

The evidence supports debtor's contention that his marriage and business associations had failed in Arizona and he left to start over in a new place. With his creditors in hot pursuit, debtor made a carefully considered decision to relocate in Florida. Such decision may have been based primarily on legal advice he received concerning Florida exemption laws.[1]

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1. The trustee alleged in count two of the complaint that the change of domicile for that reason constituted a fraudulent transfer of annuity proceeds. That theory was rejected by visiting Judge Laney in the memorandum opinion entered on December 27, 1989. Judge Laney held that the debtor had a constitutional right to travel and was free to change his domicile as he saw fit.

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Despite the fact that debtor concealed his location to avoid his ex-wife and creditors, he was domiciled in Florida for the greater part of 180 days immediately preceding the date of the filing of the petition and is entitled to avail himself of the exemptions to which Florida residents are entitled. Thus, trustee failed to demonstrate sufficient facts supporting the claim that debtor was not a Florida resident. *See Weissinger v. United States*, 423 F.2d 795 (5th Cir. 1970). Accordingly, debtor's motion for voluntary dismissal on the factual issue of domicile is granted.

Having determined, as a matter of fact, that the debtor is a Florida domiciliary, the following legal issues remain:

a. Whether debtor is entitled to claim his house, located on Stanton Place, in Longwood, Florida, as homestead.

b. Whether an annuity for the purpose of distributing lottery winnings is an annuity which can be exempted under Florida Statute Section 222.14.

c. Whether the personal property claimed as exempt in the amount of $1,000.00 was sufficiently described to constitute an exemption.

B. Applicable Exemption Law

As a Florida domiciliary, debtor is subject to Section 222.20, Florida Statutes, which precludes Florida residents from utilizing the federal exemptions provided in section 522(d) of the Bankruptcy Code. As a result, debtor may only claim exempt property through § 522(b)(2) which provides in relevant part:

> (b) Notwithstanding section 541 of this tile, an individual debtor may exempt from property of the estate the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this subsection.
>
> * * *
>
> (2)(A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtors' domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place; . . . .

Having determined that the debtor was a Florida domiciliary on the date of filing, Arizona state exemption laws do not apply and the objection to exemptions on such grounds shall be overruled.

Further, debtor's claim of domicile in Florida did not constitute a false oath or claim such that the discharge should be denied pursuant to § 727(4)(A) or (B). Accordingly, the objection to discharged contained in the remaining count of the adversary proceeding shall be overruled.

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C. Homestead Exemption

Neither the trustee, Sun Life, nor the Bank have asserted any ground, other than the failure to establish domicile, which would preclude the debtor from exempting his house located at 422 Stanton Place, Longwood, Florida, as his homestead pursuant to Article X, Section 4 of the Florida Constitution. Since the domicile issue has been resolved in debtor's favor, as a matter of law, the objections to his homestead exemption shall be overruled.

D. Annuity Exemption

Debtor disclosed his interest in the annuity established for payment of the Arizona lottery winnings in the schedules, although the amount was estimated. He then claimed the proceeds and right to payments over the next seventeen years as exempt under Florida Statute 222.14, which provides:

> The cash surrender values of life insurance policies issued upon the lives of citizens or residents of the state and upon the proceeds of annuity contracts issued to citizens or residents of the state, upon whatever form, shall not in any case be liable to attachment, garnishment or legal process in favor of any creditor of the person whose life is so insured or of any creditor of the person who is the beneficiary of such annuity contract, unless the insurance policy or annuity contract was effected for the benefit of such creditor.

The trustee, Sun Life, and the Bank contend that this section

is inapplicable to the lottery annuity under a number of theories.[2] The objectors first argue that the scope of annuity contracts exempted under Section 222.14 does not include every conceivable contract for the annual payment of monies and that gambling proceeds are excluded.

Debtor, on the other hand, argues that the statute is clear, unequivocal, and without limitation. In addition, he asserts the generally recognized proposition that exemption statutes must be liberally construed to ensure that the debtor and his family will not become public charges. *Killian v. Lawson*, 387 So.2d 960, 962 (Fla. 1980).

The same legal issue arose in a case before the Eleventh Circuit of the United States Court of Appeals. *In re McCollam*, 955 F.2d 678 (11th Cir. 1992). In that case, the debtor was the beneficiary of an annuity contract established pursuant to the settlement of a wrongful death action. Debtor claimed the proceeds as exempt property under Florida Statute 222.14. Since the same issue could arise in a Florida court, the Eleventh Circuit certified the following question to the Florida Supreme Court:

> WHETHER, AS A MATTER OF LAW, AN ANNUITY CONTRACT WHICH IS ESTABLISHED IN LIEU OF A CREDITOR PAYING A DEBTOR A LUMP SUM PRESENTLY OWED IS EXEMPT FROM CREDITOR CLAIMS IN BANKRUPTCY UNDER FLA.STAT. § 222.14.

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2. Debtor has contested Sun Life's standing to object to the exemptions, arguing that Sun Life is not a creditor. Because the trustee's objections duplicate those raised by Sun Life, it is unnecessary to determine whether or not Sun Life has standing under these circumstances.

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On January 28, 1993, the Florida Supreme Court answered the question affirmatively, holding that "section 222.14, Florida Statutes (1989), exempts an annuity from creditor claims in bankruptcy. *LeCroy v. McCollam*, 612 So.2d 572 (Fla. 1993). The Florida Court first looked to the plain language of the statute and determined that it clearly exempted all annuity contracts from the claims of creditors. *Id.* at 573-74. The Court then considered the definition of an annuity contract, concluding that the phrase is broadly interpreted and encompassed the contract at issue. *Id.* at 574. Finally, the Court found that had the legislature intended to restrict the annuity exemption, such language would have been included when the law was amended to include annuity contracts. *Id.*

Given the broad application of section 222.14 by the Florida Supreme Court, this Court concludes that the annuity at issue is properly included within the purview of such exemption. Accordingly, the objections to the exemption for the Arizona lottery proceeds paid by annuity contract shall be overruled.

E. Personal Property Exemption

Objections were made to debtor's claim of exemption for $1,000.00 in personal property on the grounds that the property was not sufficiently identified and was undervalued. None of the objectors introduced any evidence regarding the valuation of any item claimed as exempt. Accordingly, that portion of the objections appears to have been waived.

However, debtor failed to adequately specify the property claimed as exempt. The deficiency was not cured even after the objections were filed. Itemization is necessary to provide the trustee with sufficient information to determine whether an

investigation is warranted. *Payne v. Wood*, 775 F.2d 202, 207 (7th Cir. 1985), *cert. denied*, 475 U.S. 1085 (1986). Debtor failed to meet the minimal standard; thus, the objections shall be sustained and the personal property exemption disallowed.

F. Conclusion

In summary, the Court finds that debtor resided in Florida for the 180 days immediately preceding the filing of the chapter 7 petition and was a Florida resident. Accordingly, debtor's claim of domicile did not constitute a false oath and the remaining objection to discharge claim is overruled.

As a Florida resident debtor is entitled to the benefit of the Florida exemption laws. Under the Florida Constitution, he is able to claim his homestead as exempt property. Additionally, Florida Statute 222.14 permits the debtor to exempt from property of the bankruptcy estate, the Arizona lottery winnings paid pursuant to an annuity contract.

Finally, debtor failed to specifically describe the $1,000.00 of personal property claimed as exempt. Accordingly, the objections to the personal property exemption shall be sustained and the exemption shall be disallowed.

Separate orders on the objections to exemptions and motions for summary judgment, along with a separate judgment in the adversary proceeding, will be entered.

DATED May 3, 1993, in Jacksonville, Florida.

s/ George L. Proctor
GEORGE L. PROCTOR
United States Bankruptcy Judge

Appendix D

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APPENDIX E — DENIAL OF PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED JUNE 26, 1997

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 96-2391

ANDREA A. RUFF, Trustee,

Plaintiff-Appellant,

versus

THOMAS BERTRAM DIXSON,

Defendant-Appellee.

On Appeal from the United States District Court for the Middle District of Florida

BEFORE: CARNES, Circuit Judge, FAY and CAMPBELL*, Senior Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellee, Thomas Bertram Dixson, is Denied.

ENTERED FOR THE COURT:

s/ Carnes
UNITED STATES CIRCUIT JUDGE

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* Honorable Levin H. Campbell, Senior U.S. Circuit Judge for the First Circuit, sitting by designation.

(2)

Supreme Court, U.S.
FILED
OCT 27 1997
CLERK

No. 97-542

In The

Supreme Court of the United States

October Term, 1997

THOMAS BERTRAM DIXSON,

Petitioner,

v.

ANDREA A. RUFF, Trustee,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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14 pp

QUESTION PRESENTED

Whether the Eleventh Circuit correctly ruled that the bankruptcy court abused its discretion by refusing to permit the Trustee to amend her complaint objecting to Dixson's discharge.

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STATEMENT OF THE CASE

Petitioner Thomas Dixson's Statement of the Case is basically accurate so far as it goes but omits much information relevant to the Eleventh Circuit's decision to permit the Trustee, Andrea A. Ruff, to amend her complaint objecting to Dixson's discharge. The Trustee's Statement of the Case corrects those omissions.

Dixson's "Move" to Florida

Dixson's Petition states conclusorily that he "moved in August of 1988 to Florida." Of course, whether or not Dixson moved from Arizona to Florida and, if so, when, is the hotly contested issue at the heart of much of this case. As detailed in the Eleventh Circuit's opinion, which is incorporated by reference, Dixson fell deeply into debt after his investment of his lottery winnings proved disastrous. Dixson's response was to undertake a fifty-state survey to see where he would have the best chance of avoiding the claims of his creditors. Dixson chose Florida and announced his change of domicile in the fall of 1988.

However, Dixson's "move" to Florida is subject to much question. After Dixson claims to have moved to Florida, he obtained an absentee ballot to vote in Arizona, maintained his Arizona driver's license, forwarded his mail to Arizona addresses, and lied under oath at depositions to actively conceal any evidence of Florida addresses from his creditors. He did not apply for a Florida driver's license, register to vote in Florida, or receive mail directly in Florida. While "moving" to Florida, he left in Arizona his two children by his ex-wife, along with his Mercedes automobile and furniture. He

also left behind at least five active bank accounts, one of which was opened after his so-called change of domicile.

Based on what she believed to be Dixson's attempt to defraud his creditors, the Trustee filed an adversary proceeding objecting to Dixson's discharge. Her complaint was based on Dixson's active fraud in concealing himself from his creditors, his attempt to convert his annuity into an asset exempt from creditors through his move to Florida, and Dixson's fraudulent claim of being a Florida resident.[1]

Circumstances Surrounding the Trustee's Amendment of the Initial Complaint

Among the allegations in the Trustee's original complaint was a claim that Dixson had knowingly and fraudulently made a false oath or false claim within the meaning of 11 U.S.C. § 727(a)(4)(A)-(B). Discovery ensued on the complaint during which the Trustee discovered numerous additional false oaths and declarations in connection with the bankruptcy. For example, in his bankruptcy schedules, Dixson stated that he had no bank accounts for the two years prior to the filing on January 11, 1989. In fact, Dixson had fifteen bank accounts – eight personal and seven business accounts. Dixson had no explanation for this omission. Dixson's bankruptcy schedules also failed to mention that in 1988 he assigned, transferred or gave away a mortgage receivable, all of his interest in an office building in Scottsdale, his interest in

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[1] The Trustee both objected to discharge and to Dixson's claim that his lottery annuity was exempt from his creditors.

a company called Sho Low Estates, and his interest in other real estate investments.

Dixson also failed to explain missing assets from his bankruptcy schedules as required. For example, on a March 1987 financial statement prepared for the purpose of obtaining a loan, Dixson had listed BPC Properties, Inc. as an asset worth $15,000. Dixson still owned this asset on the date of his bankruptcy but did not schedule it in his bankruptcy case. Dixson also lied under oath to the Trustee by denying that he ever owned stock in BPC Properties or served as a director or officer. Discovery proved that Dixson had been at meetings, signed meeting minutes, and acted as secretary for BPC Properties for years. In fact, he was vice president in 1988. Dixson also failed to schedule two limited edition prints, a gold ring, an antique desk, and a twelve-stone diamond ring, assets which Dixson had listed in the codicil to his will on March 11, 1988.

As the Eleventh Circuit noted, some of this evidence was not discovered until June and July of 1990. Dixson's most significant omission, the $15,000 interest in BPC Properties, was not discovered until the end of June 1990. Indeed, as late as June 14, 1990, Dixson was still denying in deposition that he had any interest in BPC. Many of Dixson's bank records were not discovered until the court, on July 13, 1990, compelled Dixson to produce his bank records by July 18, 1990. Two days after Dixson produced these records, the Trustee filed her eight count amended complaint. Like the first complaint, the allegations in the amended complaint concerned Dixson's false statements in connection with his bankruptcy petition,

including the false claim of residency and the assets omitted from his bankruptcy schedules.[2]

The original bankruptcy judge assigned to the case, Judge Corcoran, deferred ruling on the motion to amend the complaint pending determination of issues set for trial on July 27, 1990. The court then conducted a three day bench trial on the matters raised by the original and amended complaint. At the conclusion of the Trustee's case, Dixson moved for involuntary dismissal. Judge Corcoran stated that he would rule on the motion or continue the trial with a presentation of Dixson's case after he read deposition excerpts submitted by the Trustee as part of her case in chief. However, the court never issued a ruling on Dixson's motion or on the Trustee's motion to

---

[2] Count I of the amended complaint alleges that Dixson's claim of Florida domicile for the period proceeding the filing of his petition constitutes a false oath or claim. 11 U.S.C. § 727(a)(4)(A)-(B). Count II concerns Dixson's transfer of certain property in 1988 with the intent to hinder, delay or defraud either his creditors or the Trustee. 11 U.S.C. § 727(a)(2)(A)-(B). Count III asserts that Dixson concealed bank account records and business records from which Dixson's financial condition could be ascertained. 11 U.S.C. § 727(a)(3). Count IV concerns a false oath or claim relating to the omission of certain information on Dixson's bankruptcy schedules. 11 U.S.C. § 727(a)(4)(A)-(B). Count V alleges that Dixson withheld recorded information from an officer of the estate who is entitled to such information under 11 U.S.C. § 727(a)(4)(D). Count VI complains of Dixson's failure to explain satisfactorily his loss of assets or deficiency of assets. 11 U.S.C. § 727(a)(5). Count VII incorporates the previous counts. 11 U.S.C. § 727(a)(2)-(5), (c)(1). Count VIII is alleged in the alternative and asks the court to revoke any discharge granted to Dixson on the basis of fraud. 11 U.S.C. § 727(d).

amend the complaint. Over two years later, Judge Corcoran entered an order voluntarily recusing himself from all of the Trustee's cases, including this case.

The case was then assigned to Bankruptcy Judge Proctor. On May 3, 1993, without conducting any trial and over the Trustee's objections, Judge Proctor certified that he was familiar with the record and overruled the Trustee's objections to the discharge.[3] See Petitioner's Appendix ("A.") at 30a-43a. Without explanation, the court also denied the Trustee's long-outstanding motion to amend the complaint. These orders were affirmed by the District Court for the Middle District of Florida (A. 24a-29a).

The Eleventh Circuit reversed. Applying long-settled law concerning the amendment of complaints, the court determined that the courts below had abused their discretion in denying the motion for leave to amend. Dixson's Petition for Writ of Certiorari followed.

ARGUMENT

This case is far from "certworthy." It concerns nothing more than the application of well-settled principles governing the amendment of pleadings and the "relation-back" doctrine. Dixson alleges no dispute concerning the applicable law. Instead, Dixson merely disagrees with the Eleventh Circuit's application of those principles to the unique facts at hand. Dixson's disagreements with the

[3] Judge Proctor also overruled the Trustee's objection to the exemption from creditors claim by Dixson.

Eleventh Circuit's factual analysis and conclusions are not a proper basis for certiorari review by this Court.

Standards Applicable to the Amendment of Complaints in Bankruptcy Adversary Proceedings

Bankruptcy Rule 7015 provides that Rule 15 of the Federal Rules of Civil Procedure governs the amendment of pleadings in bankruptcy adversary proceedings. The standards of Rule 15 are well familiar to this Court. Leave of court is required to amend a pleading after a responsive pleading has been filed. However, such leave "shall be freely given when justice so requires." Fed. Rule Civ. P. 15(a). Noting that the mandate of Rule 15(a) for liberal amendments "is to be heeded," *Foman v. Davis*, 371 U.S. 178, 182 (1962), this Court has observed:

> the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

Id.

The lower federal courts uniformly apply this Court's teachings in *Foman* to enforce the liberal policy of allowing amendments under Rule 15(a). Thus, unless a substantial reason exists to deny leave to amend, the discretion of the district court is not broad enough to permit denial. *See Motor City of Jacksonville, Ltd. v. Southeast Bank*, 83 F.3d 1317, 1323 (11th Cir. 1996), *vacated on other grounds by Hess v. FDIC*, ___ U.S. ___, 117 S. Ct. 760 (1997). *See also Howey v. United States*, 481 F.2d 1187, 1190

(9th Cir. 1973) (district court's action on a motion for leave to amend should be reversed only if the action is an abuse of discretion; there is a "strong policy to permit the amendment of pleadings").

The Standards of Rule 15 Applied

The decision below that the bankruptcy court abused its discretion in denying the motion for leave to amend directly heeded this Court's admonition that the trial court necessarily abuses its discretion if it denies a motion for leave to amend without reason. The Eleventh Circuit's application of this settled law to the facts of this case provides no basis for certiorari. *See U.S. v. Johnston*, 268 U.S. 220, 227 (1925) (the Court "does not grant certiorari to review evidence and discuss specific facts.").

Here, as the Eleventh Circuit noted, the only conceivable reason for denying the motion for leave to amend was the fact that it was brought on the eve of trial. But as the Eleventh Circuit pointed out, Dixson had no one to blame but himself for that development. Discovery taken after the filing of the original complaint proved that Dixson's bankruptcy schedules were, at the very least, astoundingly incomplete and, more likely, a deliberate fraud. The Trustee did not even obtain the bank account records she sought in discovery until July 18th, only nine days before trial. Her amended complaint was filed only two days later. The Eleventh Circuit's decision to permit the amendment in light of Dixson's conduct was unremarkable: "Had Dixson been more honest in his schedules and during discovery, the motion may not have been filed one week before trial." (A. 19a). In granting the

amendment, the court simply refused to reward Dixson for his own delay. Reviewing this routine exercise of discretion would serve no useful purpose.

Dixson's Statute of Limitations Argument

Rule 4004 of the Federal Rules of Bankruptcy Procedure requires complaints objecting to discharge to be filed within sixty days of the initial date set for the meeting of creditors. Dixson argues that Rule 4004's deadline is absolute and that the Trustee's motion for leave to amend her complaint was untimely because it was filed after the sixty day period. However, Dixson acknowledges that the Circuit Courts of Appeal have uniformly permitted the filing of an amended complaint, even after the expiration of the limitations period, whenever the amended complaint "relates back" to the original pleading. *See* Petition at 9. The amended complaint "relates back" whenever the new allegations "arose out of the same conduct, transaction, or occurrence attempted to be set forth in the original pleading." Fed. Rule Civ. P. 15(c)(2).

The Eleventh Circuit's opinion acknowledged and applied this well settled precedent (A.19a-20a). As the court noted, both complaints are based on the same sections of the bankruptcy code. 11 U.S.C. §§ 727(a)(2)(A)-(B), (a)(4)(A)-(B), (D). The essence of both complaints is that Dixson attempted to defraud the Trustee and his creditors by misstating or omitting critical information from his bankruptcy schedules. In light of the information that came to light during discovery, this conclusion is not surprising. According to the court:

> In both complaints, the underlying theme is that Dixson's discharge should be denied because of extensive fraud. While some of the factual allegations in the complaints differ, as we have already stated, this difference is apparently a direct result of Dixson's unwillingness to be candid and forthcoming in filling out his petition and during the course of discovery.

(A. 20a).

Once again, there is no dispute over the law that should apply, only to its application to the particular facts of this case. Dixson's attempt to seek yet another level of appellate scrutiny should be rejected. This Court, as a court of law, does not sit to correct errors in fact-finding and "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *E.g., Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

Equitable Tolling

Dixson's second issue suggests that the court improperly applied equitable principles to toll the statute of limitations based on Dixson's fraudulent concealment. The court would have been well within its right to do so. Fraudulent concealment as grounds for objection to discharge tolls the limitation period fixed by Bankruptcy Rule 4004. *See Lust v. Burke*, 876 F. Supp. 1474, 1487 (D. Md. 1994); *In re Mufti*, 61 B.R. 514, 518 (Bankr. C.D. Cal. 1986). These cases merely represent the specific application in the bankruptcy context of the general rule that fraudulent concealment of a cause of action results in the equitable tolling of any federal statute of limitation in the

absence of contrary congressional intent. *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946). To hold otherwise would be to ignore the congressional intent "to provide relief for the *honest* but unfortunate debtor."[4] *Birmingham Trust Nat'l Bank v. Case*, 755 F.2d 1474, 1477 (11th Cir. 1985) (citing *Brown v. Felsen*, 442 U.S. 127, 128 (1979).

However, the court below did not reach the issue of equitable tolling. It merely observed that Dixson could claim no prejudice based on the fact that the amended complaint was filed so close to trial. Any prejudice was of Dixson's own making (A. 20a-21a). The court also observed, correctly, that the amended complaint stated a claim because the serious omissions on Dixson's bankruptcy schedules could serve as a basis for denying his discharge. *See, e.g., In re Hawley*, 51 F.3d 246, 248-49 (11th Cir. 1995). These unassailable principles need no further

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[4] The conclusion that Section 4004 is subject to equitable tolling principles is also supported by the Bankruptcy Code itself. As several courts have noted, it is possible to file a complaint to revoke a discharge based on fraud if the requesting party did not know of the fraud until after the discharge was granted. 11 U.S.C. § 727(d)(1) and (e). This complaint can be filed, even before the discharge is granted. *In re Stevens*, 107 B.R. 702 (Bankr. 9th Cir. 1989); *In re White*, 133 B.R. 206 (Bankr. S.D. Ind. 1990). As *Mufti* observed, it would defy logic to suggest that if the Trustee discovers the fraud before discharge but after the last date to object to discharge, the Trustee has no remedy. *Mufti*, 61 B.R. at 519. Dixson has cited no case to the contrary. Dixson's cases merely restate the well-settled principles for consideration of amendments of pleadings. None contain allegations of fraudulent concealment, and none discuss the issue of equitable tolling.

review or clarification from this Court. Certiorari should be denied.

CONCLUSION

This case is not "certworthy." The legal principles presented are well settled. Dixson is merely a disappointed litigant seeking yet one more level of appellate review. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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